IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1976
NO. 76-1830

COMMONWEALTH OF PENNSYLVANIA,
PETITIONER

v.

HARRY MIMMS,
RESPONDENT

PETITIONER'S REPLY MEMORANDUM

GAELE McLAUGHLIN BARTHOLD
ASSISTANT DISTRICT ATTORNEY

MARK SENDROW
CHIEF, MOTIONS DIVISION

STEVEN H. GOLDBLATT
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I. AN ACTUAL CASE OR CONTROVERSY IS PRESENTED BY THE INSTANT CASE. THE MERE FACT THAT RESPONDENT HAS COMPLETED THE MAXIMUM SENTENCE IMPOSED UPON HIM DOES NOT WARRANT INVOCATION OF THE MOOTNESS DOCTRINE.

IN HIS BRIEF OPPOSING CERTIORARI RESPONDENT ARGUES THAT THE INSTANT CASE IS NOT JUSTICIABLE AS A CONSEQUENCE OF HIS COMPLETION OF THE THREE YEAR PRISON SENTENCE IMPOSED. HIS RELIANCE UPON ST. PIERRE V. UNITED STATES, 319 U.S. 41, 63 S.CT. 910 (1943), AS AUTHORITY FOR THIS PROPOSITION, IS ERRONEOUS.[1] IT IGNORES THE PRACTICAL BASIS OF THE "CASE OR CONTROVERSY" REQUIREMENT, AS WELL AS THE NUMEROUS SUBSEQUENT DECISIONS OF THIS COURT WHICH DEPART FROM THE RULE ANNOUNCED IN ST. PIERRE, SUPRA, AND WHICH HOLD THAT THE MERE POSSIBILITY OF A DEFENDANT SUFFERING COLLATERAL LEGAL CONSEQUENCES FORECLOSES APPLICATION OF THE MOOTNESS DOCTRINE. STREET V. NEW YORK, 394 U.S. 576, 89 S.CT. 1354 (1969); SIBRON V. NEW YORK, 392 U.S. 40, 88 S. CT. 1889 (1968); CARAFAS V. LA VALLEE, 391 U.S. 234, 88 S.CT. 1556 (1968); GINSBERG V. NEW YORK, 390 U.S. 629, 88 S.CT. 1274 (1968); SEE ALSO BENTON V. MARYLAND, 395 U.S. 784, 89 S.CT. 2056 (1969).

RECOGNITION OF A DEFENDANT'S RIGHT TO REVIEW UNDER THE CIRCUMSTANCES CONSIDERED IN THE FOREGOING CASES NECESSARILY PRESUMES A CORRELATIVE PROSECUTORIAL RIGHT TO REVIEW WITHOUT

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1. NEITHER ARE THE OTHER AUTHORITIES WHICH ARE RELIED UPON BY RESPONDENT PERSUASIVE. IN UNITED STATES V. MUNSINGWEAR, 340 U.S. 36, 71 S.CT. 104 (1950), A DISMISSAL ON ACCOUNT OF MOOTNESS WAS AFFIRMED AS A CONSEQUENCE OF THE PRINCIPLE OF RES JUDICATA. S.E.C. V. MEDICAL COMMITTEE FOR HUMAN RIGHTS, 404 U.S. 403, 92 S.CT. 577 (1972), WHICH ARTICULATES GENERAL PRINCIPLES GOVERNING MOOTNESS, IS IRRELEVANT WITHIN THE PARTICULARIZED CONTEXT OF THIS CRIMINAL PROSECUTION.

REGARD TO THE MOOTNESS DOCTRINE. THAT DOCTRINE IS EXPRESSIVE OF THE NEED FOR ANTAGONISTIC LITIGANTS WHO WILL ADVANCE VIGOROUS ARGUMENTS TO PROTECT SUBSTANTIVE RIGHTS AND THUS SHARPEN THE ISSUES PRESENTED. SEE JACOBS V. NEW YORK, 388 U.S. 491, 87 S.CT. 2098, DISSENTING OPINION BY MR. JUSTICE DOUGLAS (1967); SEE ALSO NORTH CAROLINA V. RICE, 404 U.S. 244, 92 S.CT. 402 (1971). THE REVIEW OF ANY CRIMINAL CONVICTION PRESUPPOSES AN ADVERSARIAL SITUATION WHICH WILL AFFECT THE RIGHTS OF BOTH LITIGANTS. THE INTEREST OF THE PROSECUTION, IN PRESERVING THE INTEGRITY OF A CONVICTION, IS NO LESS SIGNIFICANT THAN THE INTEREST OF THE DEFENDANT IN SECURING THE BENEFITS WHICH FLOW FROM A NULLIFICATION OF THAT CONVICTION. RESPONDENT'S CONVICTION WOULD BE RELEVANT, INTER ALIA, TO QUESTIONS OF BAIL AND SENTENCE IN ANY SUBSEQUENT STATE CRIMINAL PROCEEDINGS AGAINST HIM. 18 C.P.S.A. §§1322, 1331, 1332; PA. R. CRIM. P. 4004. SUBSTANTIAL STATE INTERESTS ARE, THEREFORE, AT STAKE AND THE DOCTRINE OF MOOTNESS SHOULD NOT FORECLOSE THIS COURT FROM REVIEWING THE PENNSYLVANIA SUPREME COURT'S REVERSAL OF RESPONDENT'S CONVICTION.[2]

MOREOVER, INVOCATION OF THE DOCTRINE OF MOOTNESS IN CASES SUCH AS THE PRESENT CASE, WHERE A DEFENDANT'S SENTENCE HAS EXPIRED AND THE PROSECUTION PETITIONS FOR REVIEW BY THIS COURT, WOULD CREATE INEQUALITIES DETRIMENTAL TO BOTH PUBLIC AND STATE INTERESTS. IT WOULD ALLOW CERTAIN DEFENDANTS, UNDER THE AUTHORITY OF SIBRON, SUPRA, TO OBTAIN REVIEW OF FEDERAL CONSTITUTIONAL QUESTIONS, BUT FORECLOSE CONSIDERATION OF THE SAME ISSUES IF REVIEW IS REQUESTED BY THE STATE.[3] THE POSSIBILITY THAT AN ADVERSELY AFFECTED PARTY MAY BE PRECLUDED FROM SEEKING REVIEW BY THIS COURT, OF A STATE COURT DETERMINATION BASED ON FEDERAL CONSTITUTIONAL GROUNDS, IS A FACTOR WHICH HAS BEEN CONSIDERED CRITICAL BY THIS COURT IN DETERMINING THE EXISTENCE OF A "CASE OR CONTROVERSY." RICHARDSON V. RAMIREZ, 418 U.S. 24, F.N. 13 AT 40-41, 94 S.CT. 2655, F.N. 13 AT 2665 (1974). THE DOCTRINE OF MOOTNESS IS, THEREFORE, INAPPLICABLE.

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[2] THE PUBLIC INTEREST WOULD FURTHER SUFFER IF, AS A CONSEQUENCE OF THE REVERSAL OF THE CONVICTION PRESENTLY AT ISSUE, RESPONDENT WERE TO ACHIEVE ON A 28 U.S.C.A. §2255 MOTION, REDUCTION OF THE FEDERAL SENTENCE HE IS CURRENTLY SERVING. SEE COUNTS V. UNITED STATES, 527 F.2D 542 (2ND CIR. 1975), CERT. DENIED, 426 U.S. 923, 96 S.CT. 2632 (1976); UNITED STATES V. DORMAN, 496 F.2D 438 (4TH CIR. 1974), CERT. DENIED, 419 U.S. 945, 95 S.CT. 214 (1974).

[3] ADDITIONALLY, IT WOULD ALLOW CERTAIN DEFENDANTS, SUCH AS RESPONDENT HERE ATTEMPTS TO DO, TO REQUEST APPELLATE REVIEW AND THEN TERMINATE THE LITIGATION UPON ACHIEVING A FAVORABLE RESULT.

II. WHERE THE PENNSYLVANIA SUPREME COURT CLEARLY BASED ITS HOLDING IN THE INSTANT CASE UPON THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION, NO REMAND IS NECESSARY, AS RESPONDENT SUGGESTS, TO DETERMINE THE BASIS FOR THE JUDGMENT.

ALTERNATELY, RESPONDENT ARGUES THAT A REMAND IS NECESSARY TO DETERMINE WHETHER THE HOLDING OF THE PENNSYLVANIA SUPREME COURT WAS BASED UPON ADEQUATE AND INDEPENDENT STATE GROUNDS. HIS SUGGESTION THAT THE BASIS OF THE STATE COURT'S JUDGMENT IS UNCLEAR IS BELIED BY LANGUAGE EMPLOYED BY THE COURT IN ANNOUNCING THE DECISION. MR. JUSTICE POMEROY, SPEAKING FOR THE COURT, NOT ONLY STATED THAT:

> THE QUESTION PRESENTED IS WHETHER THE GOVERNMENTAL INTRUSION WHICH OCCURRED IN THIS CASE--AN ORDER TO LEAVE THE AUTOMOBILE AND A LIMITED SEARCH FOR WEAPONS--MAY BE JUSTIFIED CONSISTENTLY WITH THE STANDARDS OF THE FOURTH AMENDMENT[,]

BUT ALSO SPECIFICALLY ANNOUNCED THAT THE ORDER OF THE PENNSYLVANIA SUPERIOR COURT WAS REVERSED BECAUSE:

> WE CONCLUDE THAT APPELLANT'S REVOLVER WAS SEIZED IN A MANNER WHICH VIOLATED THE FOURTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES[.]

COMMONWEALTH V. MIMMS, ___ PA. ___, 370 A.2D 1157, 1159, 1158 (1977); PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA, 2A, 1A (CITATION OMITTED).

RESPONDENT'S SUGGESTION THAT THE PENNSYLVANIA SUPREME COURT'S CITATION OF PENNSYLVANIA AUTHORITY CREATES DOUBT ABOUT THE BASIS OF THE COURT'S DECISION, DESPITE THE PLAIN LANGUAGE OF THE OPINION, HAS NO SUBSTANTIAL BASIS. AN EXAMINATION OF

THE CASES RELIED UPON BY THE COURT CONCLUSIVELY DEMONSTRATES THAT THEY TOO WERE BASED ON FEDERAL CONSTITUTIONAL (FOURTH AMENDMENT) GROUNDS.[4] MOREOVER, THE MERE POSSIBILITY THAT THE CONCLUSION REACHED BY THE PENNSYLVANIA SUPREME COURT MIGHT ALSO HAVE BEEN REACHED AS A MATTER OF STATE LAW DOES NOT CREATE AN ADEQUATE AND INDEPENDENT STATE GROUND WHICH WARRANTS DISMISSAL OF THE PETITION. UNITED AIR LINES V. MAHIR, 410 U.S. 623, 630-631, 93 S.CT. 1186, 1191 (1973).

FOR THE SAME REASON, THE COINCIDENTAL EXISTENCE, IN ARTICLE I, SECTION 8 OF THE PENNSYLVANIA CONSTITUTION, OF A PROVISION EQUIVALENT TO THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION, IS IMMATERIAL. THIS PROVISION WAS NEITHER REFERRED TO OR RELIED UPON BY THE PENNSYLVANIA SUPREME COURT. THERE IS NO AMBIGUITY AS TO THE BASIS OF THE PENNSYLVANIA SUPREME COURT'S DECISION; ITS LANGUAGE IS CLEAR. IT IS PERHAPS NOTEWORTHY THAT MR. JUSTICE POMEROY, WHO AUTHORED MIMMS, HAS EXPRESSED DISSATISFACTION WITH THE PENNSYLVANIA SUPREME COURT FOR RELYING UPON ITS SUPERVISORY POWERS, AFTER A REMAND BY THIS COURT, BECAUSE SUCH RELIANCE:

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[4] SEE COMMONWEALTH V. MURRAY, 460 PA. 53, 59-60, 331 A.2D 414 (1975); COMMONWEALTH V. BOYER, 455 PA. 283, 286, 314 A.2D 317 (1974); COMMONWEALTH V. JEFFRIES, 454 PA. 320, 322, 311 A.2D 914 (1973); COMMONWEALTH V. SWANGER, 453 PA. 107, 110-111, 113-114, 307 A.2D 875 (1973); COMMONWEALTH V. POLLARD, 450 PA. 138, 142, 299 A.2D 233 (1973); COMMONWEALTH V. DUSSELL, 439 PA. 392, 395, 397, 266 A.2D 659 (1970).

> REPRESENTS A REFUSAL TO ACCEPT ACCOUNTABILITY FOR OUR DECISIONS ON FEDERAL CONSTITUTIONAL LAW AND AN UNWILLINGNESS TO LEAVE TO THE HIGHEST FEDERAL COURT THE LAST WORD ON QUESTIONS OF SUCH LAW. IF THIS COURT SEES FIT TO BASE A HOLDING IN A CASE UPON ITS INTERPRETATION OF THE FEDERAL CONSTITUTION, AS IT CLEARLY DID IN CAMPANA, THEN IT MUST TOLERATE REVIEW OF SUCH A DECISION BY THE SUPREME COURT OF THE UNITED STATES. IT WILL NOT DO, WHEN OUR DECISION IS UNDER CHALLENGE, TO ANNOUNCE THAT WE WERE MERELY EXERCISING A SUPERVISORY POWER. IN SHORT, SINCE THE MAY 4, 1973 OPINIONS OF JUSTICES ROBERTS AND EAGEN (IN WHICH A MAJORITY OF THE COURT JOINED) ARE PLAINLY BASED ON THE FEDERAL CONSTITUTION'S DOUBLE JEOPARDY CLAUSE, WE SHOULD NOT HESITATE TO SAY SO. [FOOTNOTE OMITTED]

COMMONWEALTH V. CAMPANA, 455 PA. 622, 314 A.2D 854 (1974), DISSENTING OPINION OF POMEROY, J. AT 631, 314 A.2D AT 859 (ON REMAND FROM THE UNITED STATES SUPREME COURT; PENNSYLVANIA V. CAMPANA, 414 U.S. 44, 94 S.CT. 73 (1973)).

SINCE THE BASIS OF THE PENNSYLVANIA SUPREME COURT'S DECISION IN THIS CASE IS CLEARLY THE UNITED STATES CONSTITUTION, A REMAND IS UNNECESSARY.

CONCLUSION

FOR THE FOREGOING REASONS, THE COMMONWEALTH OF PENNSYLVANIA RESPECTFULLY REQUESTS THAT A WRIT OF CERTIORARI ISSUE TO REVIEW THE DECISION BELOW.

RESPECTFULLY SUBMITTED,

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ASSISTANT DISTRICT ATTORNEY

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CERTIFICATION OF SERVICE

I, STEVEN H. GOLDBLATT, ESQUIRE, COUNSEL FOR PETITIONER, COMMONWEALTH OF PENNSYLVANIA, HEREBY CERTIFY THAT I HAVE CAUSED A COPY OF THIS PETITIONER'S REPLY MEMORANDUM TO BE SERVED UPON STEPHEN ROBERT LaCHEEN, ESQUIRE, COUNSEL FOR RESPONDENT, HARRY MIMMS, BY DEPOSITING THREE COPIES IN THE UNITED STATES MAIL, FIRST CLASS, POSTAGE PREPAID, ADDRESSED TO STEPHEN ROBERT LaCHEEN, ESQUIRE, 3100 LEWIS TOWER BUILDING, FIFTEENTH AND LOCUST STREETS, PHILADELPHIA, PENNSYLVANIA, 19102, ON FRIDAY, SEPTEMBER 30, 1977.

Steven H. Goldblatt
STEVEN H. GOLDBLATT